U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: April 3, 2002

BALCA Case No.: **2001-INA-135**
ETA Case No.: P2000-CT-01297943

In the Matter of:

LUZ MARINA GARCIA
Employer,

on behalf of

MARIA ELENA GARCIA
Alien.

Appearance: Sheri B. Paige, Esq.
Norwalk, Connecticut

Certifying Officer: Raimnudo A. Lopez
Boston, Massachusetts

Before: Burke, Chapman and Vittone
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

ORDER OF REMAND

This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of housekeeper/nanny.[1] The CO denied the application and Employer requested review pursuant to 20 C.F.R. §656.26.

[1] Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On January 14, 1998, Employer, Luz Marina Garcia, filed an application for labor certification to enable the Alien, Maria Elena Garcia, to fill the position of "housekeeper/nanny." (AF 60). Six years of grade school and three months in the position offered were required. Employer was notified by the Connecticut Department of Labor that one U.S. applicant, Anka Tomaj, had applied for the position. (AF 43). Employer provided a Response to Recruitment form dated August 8, 2000, indicating that she telephoned this applicant on four occasions (7/200, 7/3/00, 7/4/00 and 7/5/00) and never received a return telephone call. (AF 42). In a supplemental Response to Recruitment form, signed on August 11, 2000, Employer indicated stated that the U.S. applicant had telephoned on August 10, 2000, but rejected the position because the applicant (1) felt uncomfortable working with a Spanish boss; (2) felt that their cultures were too different; (3) thought Norwalk was not an impressive community; and (4) wanted a higher class situation. (AF 39).

On March 13, 2001, the CO issued a Notice of Findings, ("NOF"), proposing to deny certification pursuant to 20 C.F.R. §656.24(b)(6) and 20 C.F.R. §656.24(b)(2)(ii). (AF 12). Specifically, the CO noted that the Employer had a response from a U.S. applicant who appeared from her resume to be qualified for the position. The CO determined that while Employer indicated that she telephoned twice without success, the U.S. applicant appeared highly qualified, having ten years of experience. The CO stated that Employer provided no evidence of further attempts to contact the applicant. Employer was advised to submit evidence which shows that Employer had made a good faith effort to contact this U.S. applicant, which evidence should include, but was not limited to, certified mail receipts showing that a certified letter was sent to the U.S. applicant. The CO made no reference whatsoever to the August 11, 2000 Supplemental Response.

By cover letter dated April 16, 2001, Employer's counsel submitted Employer's rebuttal letter of April 13, 2001. (AF 16). In her letter, Employer stated that she had left messages for the U.S. applicant on four different occasions in early July of 2000. (AF 17). The applicant then contacted her about the position on August 10, 2000, and advised Employer that she was not interested in the position because she would be "uncomfortable working with a Hispanic boss" and she was seeking a "more prestigious community." According to Employer, this applicant rejected the position and Employer "was never so insulted in [her] life."

A second rebuttal, evidently not submitted through Employer's counsel, was received by the CO on April 17, 2001. (AF 13). This rebuttal was significantly different than the rebuttal submitted by Employer's counsel. The second rebuttal states that the application was being made for Employer's sister who was already in the United States, and for whom she intended to provide the opportunity to adjust to her status in this county. This rebuttal also indicates that Employer never actually spoke to the U.S. applicant, but only the applicant's husband and son. Employer further asserted that the U.S. applicant already had her "Greencard" and had more opportunities than Employer's sister. Employer pointed out that the U.S. applicant did not speak Spanish and did not drive. Included was an Immigrant Petition for Relative, Fiancé or Orphan, which Employer claimed to have filed on behalf of her sister. The second rebuttal is signed under the name "Luz M. Carbo" for the reason that her

name was changed after naturalization. (AF 10).

A Final Determination was issued on May 1, 2001. (AF 8). The CO stated that he was "compelled to state forthright that two distinct sets of rebuttal documentation had been received that are completely different from each other in content, subject, and grammar and syntax usage - although they appear to both bear the printed name of the employer." The CO also pointed out that there were discrepancies in the appearance of Employer's signature throughout the material in the file. Upon reviewing the documentation received on April 17, 2001, the CO determined that the Alien was Employer's sister, and therefore, Employer was unlikely to displace her with a U.S. worker. Indeed, that rebuttal evidence made it clear that Employer never intended to offer the position to a U.S. worker, and that no *bona fide* employer/employee position existed.

With regard to the second set of rebuttal documentation, the CO noted that the second rebuttal states that the applicant never responded to continued phone calls, and that Employer had failed to provide other proof of contact, such as certified mail receipts, to show that Employer had in fact made additional efforts to contact the U.S. applicant other than by telephone. Not only was the documentation submitted insufficient to address the concerns raised in the NOF, the CO also determined that the confusing nature of the rebuttal documentation raised serious questions as to the *bona fide* nature of the position.

On May 16, 2001, Employer requested review of the denial of labor certification by the Board of Alien Labor Certification Appeals ("BALCA" or "Board"). (AF 1). In her Request for Review, Employer contends that the rebuttal signed on April 13, 2001 is that of Employer, and that the second rebuttal on April 17, 2001 was a forgery. In support of the contention that the second rebuttal was not from Employer, two notarized affidavits were submitted: one from Employer and one from the Alien. The Alien's affidavit indicates that she was upset in learning that a U.S. applicant might be offered the position, and thereafter took the paperwork to a friend who sent in some paperwork without the knowledge of Employer or Employer's attorney. The Alien stated that she had not asked for details of what the friend had done, but later found out that the friend had written a letter and signed Employer's name.

Employer's affidavit states that she when she received the U.S. applicant's resume, she was ready to hire the applicant based on her skills and resume, but the applicant never returned her phone calls. Only after the recruitment report was submitted did the U.S. applicant call. Employer contacted her attorney about the call, and they sent in a supplemental recruitment report. Employer, indicating that the Alien is her sister, stated that when her sister learned that the U.S. applicant might be offered the position, she became very upset. Employer stated that she had drafted the response to the NOF with her attorney, and that unbeknownst to her or the attorney at the time, her sister took the application papers to a friend, who signed her name and sent the letters to the CO. Employer stated that she only learned about her sister's actions in having a friend send a second response to the NOF about two weeks after the receipt of the Final Determination.

The case was docketed by the Board on August 17, 2001.

DISCUSSION

The Board's scope of review is based on the record upon which the denial of labor certification was made, the request for review, and any statement of position or legal briefs. 20 C.F.R. 656.27(c). *See also* 20 C.F.R. 656.26(b)(4). Thus, evidence first submitted with the request for review generally will not be considered by the Board. *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992). The submission of new evidence, however, is appropriate where the Final Determination introduces new issues or discusses new evidence not previously identified in the NOF. *Harry Tancredi*, 1988-INA-441 (Dec. 1, 1988) (*en banc*). In the instant case, Employer's declaration in the request for review makes it clear that she and her attorney did not learn of the second rebuttal submission until receipt of the Final Determination. Thus, this case presents circumstances where it would be an abuse of discretion not to consider the new evidence, *i.e.*, the declarations attached to the request for review explaining the genesis of the second rebuttal and its alleged status as a forgery submitted by a friend of the Alien.

Although we accept that the second rebuttal was not submitted or authorized by the Employer who filed the application, the detail contained in that rebuttal indicates that whoever wrote the letter had some accurate knowledge about the case not previously revealed to the CO – such as the important fact that the Alien is the Employer's sister. It is an interesting aspect of the second rebuttal letter that the author signed it as "Luz M. Carbo" based on the Employer's change of name upon naturalization. It also shows an e-mail address of "LUZED@prodigy.net." The name Carbo never appeared in the application materials prior to this letter. Employer's later declaration states that the alleged forger signed her name to the letter -- and is silent as to the use of the name "Carbo." We take official notice that a search for the name "Luz Garcia" on the Yahoo Internet "People Search" provides no hits, whereas a search for the name "Luz Carbo" yields "Edward Luz Carbo" at the exact address and phone number listed on the ETA750A for Employer. We also observe that the copy of the INS Form I-797C appearing at AF 10 and bearing the name Luz M. Carbo, and responding to a Petition for Alien Relative application on behalf of her sister Maria E. Garcia, appears to be genuine.

These factors indicate that the author of the letter, even if not the Employer, had some first-hand knowledge about the circumstances of this case. They also strongly suggest that what the letter says about the communications with the U.S. applicant (*e.g.*, that Employer never spoke directly with the U.S. applicant), and Employer's motivation for filing the permanent labor certification -- assisting her sister to adjust to legal status under 245(i)[2] -- cannot be entirely discounted.[3] This information

[2] Section 245(i) of the Legal Immigration Family Equity Act, Immigration and Nationality Act, 8 U.S.C. § 1255(i), allowed certain persons who entered the U.S. illegally to apply for adjustment of status.

[3] In the ETA 750B, the Alien indicated that her residence was in Columbia, and that she did not have a visa. (AF 62). In the affidavits submitted with the request for review, it is clear that the Alien took the application file from Employer to copy it, supporting the apparently forged rebuttal letter's assertion that the Alien is already in the United States and needs to adjust to legal status.

reinforces the CO's concern that there may not have been good faith in recruitment of the U.S. applicant, and supports the raising of the additional issue of whether the job is truly open to U.S. workers in view of the familial relationship between the Alien and the Employer. *See Paris Bakery Corp.*, 1988-INA-337 (Jan. 4, 1990) (*en banc*) (close family relationship between the alien and the person having the hiring authority standing alone not fatal to an application, but does require that the *bona fides* of the application be given greater attention).

On the other hand, there is nothing inherently improper in an alien to seeking to take advantage of section 245(i) to adjust to legal status through alien labor certification. In a permanent alien labor certification application, however, a *bona fide* job opportunity, and not merely a test of the labor market, is required. *See Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (*en banc*). Thus, a job created solely for the purpose of a 245(i) adjustment is a sham, and is not certifiable. That said, it is not implausible for a family in Connecticut to seek to employ a housekeeper/nanny and to have a difficult time finding qualified U.S. workers to apply for such a position. Moreover, the declarations of both Employer and her sister indicate that there was a fear in the household that a U.S. worker may be offered the position for which labor certification was being sought, suggesting that the application may be valid.

The CO's precise grounds for denial of the application cannot be affirmed. The denial is premised on (1) the CO's acceptance of the second rebuttal letter's statement that the U.S. applicant was never spoken with directly and (2) the CO's finding that there was a lack of proof of contact of the applicant.[4] Employer, however, did not know at the time it submitted rebuttal of the existence of the second rebuttal letter, and therefore had no opportunity to refute the basis for these findings by the CO. Moreover, the issue of the familial relationship between Employer and the Alien was not raised until the Final Determination, therefore also requiring an opportunity for response by Employer.

Because the Board has no authority to conduct an investigation or receive new evidence, we remand this case for the CO to look into these issues.

[4] In the NOF, the CO stated that certified mail receipts to show actual contact with the U.S. applicant would be required for rebuttal. Although this is not the precise ground for denial in the Final Determination, it should be noted that the Board has held *en banc* that certified mail receipts to show actual contact with U.S. applicants are not required to meet an employer's burden of proof in establishing good faith in recruitment –rather, an employer only need to show reasonable efforts to contact U.S. workers, and this can be done in some circumstances without certified mail. *M.N. Auto Electric Corp.*, 2000-INA-165 (BALCA Aug. 8, 2001) (*en banc*).

ORDER

The Certifying Officer's denial of labor certification is hereby **VACATED** and the matter **REMANDED** for further proceedings.

For the panel:

JOHN M. VITTONE
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.